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The Los Angeles Bar Association BULLETIN

Official Publication of the Los Angeles Bar Association, Los Angeles, California

STATE BAR HEAD MAKES STATEMENT

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State Bar Head Issues Statement. President Wykoff Makes a Report Regarding Suit Against Bank Charged With Unlawful Practice

THE BULLETIN has received a statement from President Wyckoff of the State Bar on the condition of the appeal of the State Bar to the Supreme Court in the suit against a Los Angeles bank charged with unlawful practice of law. The communication is printed for the information of members of the bar, many of whom have made inquiry as to the progress of the case.

Editor, Bulletin, Los Angeles Bar Association:

I HAVE HAD several inquiries from members of the bar about the present condition of the appeal of the State Bar to the Supreme Court in the case of The State Bar of California, a public corporation vs. Security-First National Bank of Los Angeles, a national banking association. Most of these inquiries come from Los Angeles so I am asking space to make this public statement of the matter.

The transcript and briefs are all on file in the Supreme Court, and the case was on the July calendar at San Francisco for argument.

Since about the first of the year attempts have been made on the part of the State Bar of California and the California Bankers Association to reach some settlement of the controversies that have existed between banks and bar. These culminated in the appointment of a joint conference committee of the two organizations to deal with the matter and report back to the Executive Council of the Bankers Association and the Board of Governors of the State Bar.

Proceedings Stayed

The agreement under which this conference committee was appointed is contained in a series of letters between Mr. Elliott, representing the bankers' association, and myself, which are reported in the June, 1934 number of the State Bar Journal. This agreement provided that proceedings on the merits in the two pending cases should be stayed until January 1, 1936, pending negotiations and test of experience of any treaty that might result from the deliberations of the committee. The matter of postponement of the appeal was left to the negotiations.

Provision for the appointment of the bar members of the conference committee was made at the July meeting of the Board of Governors.

Banks Ask Postponement

The Bankers Association requested a postponement of the appeal pending the negotiations. I had personally carried on a large part of the negotiations to this point, and deemed it only proper and decent that there should be such postponement pending the attempted settlement. I so recommended to the Board of Governors at its July meeting and it authorized a postponement of the appeal to the September calendar at Los Angeles.

In the meantime, the conference committee is at work. It is composed on both sides of serious-minded men who are earnestly trying to arrive at an effective settlement.

There are difficulties in the way of a settlement and the parties may not be able to agree. If not, the appeal will proceed.

If a just and effective settlement can be reached between these two important elements of society in California, I believe it will be a triumph of intelligence and good sense, and a step forward for both banks and bar.

H. C. WYCKOFF,
President, State Bar.

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Solicitation By Judge of Support For His Promotion

Opinion of Committee on Professional Ethics and Grievances of American Bar Association

OPINION 105.

SOLICITATION BY JUDGE OF SUPPORT FOR HIS PROMOTION—*It is improper for a judge of a superior court of record, when seeking election or appointment to the appellate court, to solicit by letters or otherwise the aid and endorsement of attorneys of his bar and other attorneys of the larger jurisdiction.*

A judge of a *nisi prius* court in a large community desires to be elevated to a higher judicial position. Many attorneys are members of the judge's local bar.

The judge desiring promotion to the appellate bench, the jurisdiction of which is much more extensive territorially and otherwise than that of the trial court, sends letters to members of his bar and to members of the bar of the appellate court, soliciting endorsement.

The committee is asked to express its opinion as to the propriety of the judge's conduct in soliciting endorsement of attorneys.

The committee's opinion was stated by Mr. Strother, Messrs. Sutherland, Hinkley, Carney, Harris, Martin and Phillips concurring.

The committee does not approve of such solicitation. The committee is of the opinion that the solicitation of attorneys by the judge in seeking higher judicial position contravenes both the letter and spirit of Canon 30, Judicial Ethics, American Bar Association, which says:

> "If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.
>
> "He should not permit others to do anything in his behalf which would reasonably lead to such suspicion."

Judicial Candidates Endorsed In Bar Plebiscite

MEMBERS of the Los Angeles Bar Association, and of the twelve Bar Associations affiliated with it, participated in a vote upon the qualifications of the candidates for the Superior Court and District Court of Appeal at the coming election.

Twelve hundred and thirty-four lawyers voted in the plebiscite on District Court of Appeal candidates. The candidates named below received the highest vote for the respective offices. Therefore, they are endorsed as *qualified and recommended* for election.

The vote of the members of the Bar Associations was taken with extreme care and absolute secrecy. The result reflects the independent judgment of those voting on the relative qualifications and fitness of the candidates who submitted to the plebiscite.

THE FOLLOWING CANDIDATES FOR THE SUPERIOR COURT ARE ENDORSED AND RECOMMENDED

Office No. 1—Elliot Craig.
Office No. 2—William C. Doran.
Office No. 3—Douglas L. Edmonds.
Office No. 4—Fletcher Bowron.
Office No. 5—Thomas C. Gould.
Office No. 6—Leon R. Yankwich.
Office No. 7—B. Rey Schauer.
Office No. 8—Joseph P. Sproul.
Office No. 9—Charles W. Fricke.
Office No. 10—William Tell Aggeler.
Office No. 11—Emmet H. Wilson.
Office No. 12—Marshall F. McComb.
Office No. 13—Troy Pace.
Office No. 14—Samuel R. Blake.
Office No. 15—Robert Walker Kenny.
Office No. 16—Thomas L. Ambrose.
Office No. 17—Frank M. Smith.
Office No. 18—Clarence L. Kincaid.
Office No. 19—Lucius P. Green.

PRESIDING JUSTICE, DIVISION TWO
(Short Term, Ending January 1, 1945)
Albert Lee Stephens

ASSOCIATE JUSTICE, DIVISION TWO
(Short Term, Ending January 1, 1937)
Walter Desmond

Shall the Deficiency Judgment Be Abolished?

By Roy V. Rhodes, of the Los Angeles Bar

WHETHER the right to a deficiency judgment in a mortgage or trust deed foreclosure shall be abolished is at present a very live topic. The man on the street says: "Away with it. Let the lender take his chances with the borrower," and as this is the open season for politics we can expect to hear *"Vox populi, vox Dei."* But in solving a technical problem little help can be expected from popular discussion. Emotional thinking has led us into many errors but has never gotten us out of any except by accident.

The chief argument commonly heard against the deficiency judgment is expressed in the following excerpt from the public press:

> "There is no good reason why a lender who lends $1500 on a piece of property he thinks is worth $3000 should be permitted to force the borrower to pay a deficiency if the value of the property drops below $1500 before the note can be collected."

This sounds plausible but behind it lies a serious and far-reaching limitation of the constitutional right of contract. Remedies for acute, temporary conditions should be found, if possible, without disturbing fundamentals.

The Real Question.

The real question is: Shall the note of the borrower be and remain, like other written contracts, a valid and binding obligation, meaning what it says, with the mortgaged property as security incidental thereto, or shall we further limit the right of contract guaranteed by the Constitution and make the mortgaged property the lender's sole resort, thus reducing the note to the impotence of a mere scrap of paper? In the latter event I very much fear that the borrower of the future will be the first to complain at the smallness of the amount he is able to borrow.

Capital is timid and in general gravitates to places of the greatest security and most favorable terms. The borrower will, as usual, want the right to make the contract so as to obtain the most money. Many times his personal credit enters into the transaction. Care should be exercised during periods of depression not to enact laws which, while seeking to relieve from present conditions, will ultimately prove harmful if not actually prevent recovery.

Market Value.

The underlying cause of the present agitation is the difficulty in times of deflation of repaying debts incurred in times of inflation. The absence of a market for real estate places the borrower in an unenviable position. Yet we know that the mortgaged property has not lost all of its value and that it has an intrinsic value independent of its salability at any particular time and place, usually sufficient to cover the mortgage. For this reason we find expert appraisers testifying in court that there is little or no present market value because of lack of a market and at the same time admitting that there is an intrinsic or actual value. It is fair to say that today real property has an intrinsic value in excess of its market value as these terms have been defined by our courts.

In *City of Los Angeles v. Pomeroy*, 124 Cal. 597, the court says:

> "The thing to be ascertained is not market value but actual value. . . . But in a case where discoveries made after the issuance of summons demonstrated that the actual intrinsic value of the land at that date was greater than its market value—in other words when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration."

And there are numerous other cases in the field of breach of contract where our courts have held that market value is not synonymous with intrinsic value. True, the tendency has been to consider the two as synonymous, but since there is a distinction there is no reason why we should not make use of it if found to be beneficial.

Intrinsic Value.

If our statutes can be so amended that in every foreclosure where deficiency is not waived the property will be appraised as to its actual or intrinsic value as distinguished from its market value, and the mortgagor given due credit for this intrinsic value, we will eliminate most of

our trouble. This would be permanent and constructive legislation.

Let us therefore face the matter honestly: First, change our laws so that adequate credit will be given for property in the event of foreclosure, and Second, if necessary enact further mortgage moratoria conditioned on the mortgagor paying a reasonable amount for use and occupation during the period of suspension. This latter expediency has been upheld in the well known U. S. Supreme Court case of *Home Bldg. & Loan Assn. v. Blaisdell,* commonly known as the Minnesota Mortgage Moratorium decision.

State Bar Bill.

As to the first, there is now being prepared by the State Bar Committee on Trust Deeds and Mortgages for presentation to the September convention a proposal to amend Code of Civil Procedure Sections Nos. 726 and 580a so that this adequate credit can be assured to the borrower upon the sale of his property. Section 580a, new in 1933, and Section 726 as then amended both provide that *upon the application of either party* the court shall appoint an appraiser to determine the *fair market value* of the property after appraisal as of the date of sale. This, however, assumes the appearance in the action of the debtor. But the judgment debtor, the party most interested in having an appraisal, may not, in fact probably does not, find himself financially able to employ an attorney or to assume the expense of an appraisal. Also the *actual or intrinsic value* is entirely ignored.

A redraft of Section 726 will be proposed in which it is provided that upon a waiver by the judgment creditor of the right to a deficiency judgment, no appraiser shall be appointed and the clerk may enter judgment upon return of sale. But in the event deficiency is not so waived and an appraisal is not waived by the judgment debtor, and regardless of the latter's default, the court must appoint an appraiser to appraise the property as to its intrinsic value and also as to its market value if in the opinion of the appraiser there was a market for such property at the time and place of sale. There is also added a rule of evidence based upon the decisions above referred to, that in determining intrinsic value weight shall be given to evidence of market value only after it is established that there was a market at the time and place of sale for the kind of property sold. After appraisal the court must determine, on hearing, the amount of the deficiency, if any, which shall not be more than the difference between the amount due and either the intrinsic value of the property or the amount for which it was sold, whichever of the latter is the greater. The court, as now, is limited only as to the maximum amount of the judgment.

In redrafting Section 580a it has been considered that the bringing of the action provided for therein after sale under a trust deed is the assertion of the right to deficiency judgment. The proposed amendment therefore provides that prior to the time of trial or hearing on default the court shall appoint an appraiser to appraise the property in the same manner as in Section 726 above and there are similar restrictions as to the maximum amount of the judgment.

Thus the judgment creditor will not be bothered with the costs or delay of an appraisal if he waives deficiency under court foreclosure (Sec. 726) or does not sue for deficiency after sale under trust deed (Sec. 580a). In each case, however, if he desires deficiency an appraisal is mandatory.

Contract Obligations.

While these changes involving rules of evidence and procedure affect the remedy only, there are many California and U. S. Supreme Court decisions to the effect that the remedy, insofar as it affects substantial rights, is included in the term "obligation of contracts" within the meaning of the State and Federal Constitutions forbidding the passage of any law impairing the obligation of contracts. See *Welsh v. Cross,* 146 Cal. 621 and cases therein cited. If, therefore, these code sections as they now exist or as they will be if these proposed amendments are adopted cannot be made to give relief to that large number of debtors who incurred their obligations prior to August, 1933, we can invoke the authority of the Minnesota Mortgage Moratorium decision (*supra*) and enact retroactive moratoria providing for a reasonable *"quid pro quo"* during the period of extension.

In the meantime these proposed changes to the code sections will go into operation as contructive legislation and in the future will prevent in large degree a recurrence of distressing foreclosure conditions of today.

ATTENTION TO EMPLOYERS!

HELP YOUR FELLOW MEMBERS! The office of the Association has on file applications for employment classified as follows:

Experienced practitioners seeking salaried positions;

Attorneys recently admitted seeking salaried positions;

Experienced and unexperienced attorneys who are willing to render services for desk space;

Attorneys seeking working arrangements that will permit of their taking care of their own clients;

Legal Secretaries and Stenographers.

Telephone Vandike 5701 and Vandike 9992.

Your communications are kept confidential.

U. S. Supreme Court Empowered to Prescribe Uniform Rules In Actions at Law

ATTORNEY GENERAL DECLARES ACT ONE OF MOST SWEEPING LEGAL REFORMS IN U. S. HISTORY

THE ACT:

Be It Enacted, etc., That the Supreme Court of the United States shall have the power to prescribe by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure our form of civil action and procedure for both; Provided, however, That in such union or rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

IN explaining the Act of Congress conferring upon the Supreme Court of the United States the power to prescribe rules of practice and procedure in the Federal trial courts, and the benefits of the measure, Attorney General Homer S. Cummings, who recently spoke before the Los Angeles Bar Association, has stated that it is the most sweeping reform in the legal history of the United States.

Mr. Cummings' statement, published in *The United States Law Week,* says:

"Agitation for the simplification of Federal legal procedure through rules of court was begun by the American Bar Association in 1909 and was continued by the Association without abatement until 1932. In 1912 the Association adopted a resolution that a uniform system of law pleading and practice in the Federal courts should be prepared and put into effect by the Supreme Court and that, to this end, appropriate legislation should be enacted. A committee on uniform judicial procedure was appointed and collaborated in drafting the bill, which was unanimously reported by the House Judiciary Committee in March, 1914, but was not voted upon by the House. Similar bills were, due largely to the efforts of the American Bar Association, introduced in each succeeding Congress down to and including the 71st, with the exception of the 65th Congress.

"The American Bar Association committee in charge of this reform numbered among its members, from time to time, such outstanding jurists as William Howard Taft, Louis D. Brandeis, now a member of the Supreme Court, William D. Hornblower, Roscoe Pound, Samuel Williston, Joseph H. Beale, Edward T. Sanford, and William E. Mikell. Elihu Root and Alton B. Parker were among the other noted men who sponsored the reform and urged its adoption by Congress.

"The proposal was approved officially by Presidents Taft and Coolidge and was unofficially endorsed by President Wilson. It was also endorsed by Attorneys General McReynolds, now an Associate Justice of the Supreme Court, Gregory, Palmer, Stone, also a member of the present Supreme Court, and Sargent. The reform was actively supported in Congress by Senator, now Justice, Sutherland.

Widely Endorsed

"The proposal to give to the Supreme Court the power to make rules governing practice and procedure in actions at law was, at various times, endorsed by 46 State Bar Associations, the National Association of Credit Men, the Commercial Law League, the United States Chamber of Commerce, the National Civic Federa

tion, members of the Executive Committee of the Association of American Law Schools, the Conference of Commissioners of Uniform State Laws, and the Southern Commercial Congress.

"In 1921 the returns from a questionnaire which was sent to Federal Judges on the matter revealed that approximately 85 per cent of the Circuit Judges and 75 per cent of the District Judges were in favor of giving to the Supreme Court the power to prescribe procedural rules in actions at law.

Revives Issue

"Nevertheless, in March of this year I sought to revive the issue. In communication addressed to the chairman of the appropriate Senate and House Committees, I suggested that the bill to give the Supreme Court the power to prescribe rules of practice and procedure in law actions be reintroduced. On March 14, 1934, I addressed the New York County Lawyers' Association on the matter and this speech was broadcast over a National radio hook-up.

"At that time, I also announced that the proposed reform carried the endorsement of President Franklin D. Roosevelt.

"Only three months have elapsed since this renewed effort began. The passage of this sweeping measure of reform comes with almost startling suddenness after many years of disappointment. It will be welcomed gladly by all informed members of the bar and its beneficial effects will be felt throughout the judicial system of our country.

"Among the benefits that are anticipated from the new legislation are:

"(1) A modernized, simplified, scientific, correlated system of Federal procedure;

"(2) The improvement of State court procedure through the influence of the Federal system as a model, with the possibility of nation-wide uniformity with respect to matters of procedure;

"(3) The immediate detection and prompt correction of imperfections in the rules of procedure, thus avoiding the long delay necessary for relief at the hands of the legislature;

"(4) The relaxation of the rigid requirements inherent in procedural legislation, and the substitution of a system of flexible rules, thus tending to eliminate a large number of the reversals of judgments by appellate courts on technical grounds;

"(5) The expedition of law cases in the trial courts due to the elimination of complicated questions of procedure;

"(6) A substantial decrease in the volume of work required by Federal appellate courts;

"(7) The establishment of one form of civil action for both law and equity cases."

The Lawyer Mobilizes to Fight Crime

THE AMERICAN BAR ASSOCIATION has sent to all Bar publications in the country an article by Will Shafroth, assistant to the President of the American Bar Association, on the subject of the crime problem and the action being taken by Bar Associations to solve it. Mr. Shafroth says that recommendations will be submitted at the Milwaukee meeting of the A. B. A. for the setting up of machinery which should result in definite improvement. The recommendations will call upon the Governor of each state to appoint a permanent committee on Criminal Justice, to be composed of lawyers and laymen, the formation of local and state bar committees on criminal procedure and, police and prosecution, to cooperate with the Governors' committees, the unification of all enforcement agencies in each state under the attorney-general, and the creation of a state central criminal bureau with trained investigators and modern equipment.

"The resolutions to be presented at Milwaukee come out strongly," says Mr. Shafroth, "for a cleansing of the Bar of dishonest and unethical practitioners, and strengthening of disciplinary procedure all along the line."

TEXT OF RESOLUTIONS.

The text of the resolutions submitted by the Criminal Law Section to the Executive Committee of the American Bar Association for action at the annual meeting on August 29, follows:

"The American Bar Association recognizes the seriousness of the existing criminal disorder in the United States, and welcomes the responsibility and opportunity before the lawyers of the country to initiate and guide public measures to remedy these conditions. It recommends the following program of action for the better enforcement of the criminal law:

I. (a) The American Bar Association recommends to the Governor of each state (where no such organization exists) the establishment of a permanent Committee on Criminal Justice to be composed of lawyers and laymen charged with the duty of systematically following, improving and criticizing the enforcement of the criminal law. Such committees should maintain close contact with the committees of the state and local bar associations dealing with criminal procedure and police and should also, possibly through membership on such committee of a representative of the United States District Attorney's office, keep contact with the United States Department of Justice.

(b) The American Bar Association recommends to each state and local bar association the establishment of a Committee on the Reform of Criminal Procedure and also a Committee on Police and Prosecution. The committees on procedure should be charged with the serious consideration of the adoption of the model code of criminal procedure approved by the American Law Institute and with the specific recommendations in regard to criminal procedure set forth in this resolution. The Committees on Police and Prosecution should deal with criticisms and improvements of the personnel, qualifications, training and methods of the police and prosecuting staff. These committees should work in cooperation with the Section on Criminal Law of this Association and with the International Association of Chiefs of Police.

These recommendations recognize that protection of the public against the criminal is a vital concern. They recognize also that effective prosecution and elimination of politics and incompetency are major considerations.

II. The American Bar Association recommends the creation, in each state, of a State Department of Justice, headed by the attorney-general or by such other officer as may be desirable, whose duty

it would be to direct and supervise actively the work of every district attorney, sheriff and law enforcement agency, and who would be specifically charged with the responsibility therefor. This department would include a central criminal bureau equipped with records and with investigators similar in character and qualifications to those now attached to the Federal Department of Justice. The American Bar Association recommends that the Commissioners on Uniform State Laws be requested to outline an act for the establishment of such State Department of Justice so drawn as to be adaptable to various state conditions.

This recommendation recognizes the necessity in each state for centralization and the adoption of modern and non-politically controlled methods of criminal detection and prosecution.

III. The American Bar Association recommends that the state and local bar associations concentrate actively on ridding the profession of dishonest and unethical practitioners. They should diligently investigate all complaints, and where the facts warrant, disciplinary proceedings should, with the cooperation of the courts, be promptly instituted and brought to trial. The American Bar Association suggests the subject of disciplinary proceedings as a part of the National Bar Program for the ensuing year, and recommends the same subject to the state and local bar associations.

IV. The American Bar Association recommends to each state bar association that it formulate improvements in criminal law and procedure and submit them to the courts, the legislatures and the people and that the state associations work for the promulgation of rules of court where that method is available and for the enactment of laws and the amendment of constitutions where the desired improvements can only be accomplished by amendments of statutes or constitution. It recommends:

(a) That the improvements in criminal procedure be based upon a thorough consideration of the Code of Criminal Procedure prepared by the American Law Institute, and especially the following provisions contained therein:

1. Giving the accused the privilege of electing whether he shall be tried by jury or the court alone. (American Law Institute Code, Par. 266, which excepts cases where a sentence of death may be imposed.)

2. Permitting the impanelling of alternate or extra jurors to serve in the case of the disability or disqualification of any juror during trial. (American Law Institute Code, Par. 285.)

3. Permitting trial upon information as well as indictment. Where indictment by grand jury remains a constitutional requirement, waiver should be allowed. The Association recognizes that in sound practice a grand jury indictment may be desirable on some occasions. (American Law Institute Code, Par. 113.)

4. Providing for jury verdicts in criminal cases by less than a unanimous vote except in the case of certain major felonies. (American Law Institute Code, Par. 355.)

It further recommends:

(b) The adoption of the principle that a criminal defendant offering a claim of alibi or insanity in his defense shall be required to give advance notice to the prosecution of this fact and of the circumstances to be offered and that in the absence of such notice a plea of insanity or a defense based on an alibi shall not be permitted upon trial except in extraordinary cases in the discretion of the judge. (American Law Institute Code, Par. 235, provides for advance notice before evidence of insanity or mental deficiency can be introduced.)

It also recommends:

(c) Permitting court and counsel to comment to the jury on the failure of a defendant in a criminal case to testify in his own behalf. (At the 1931 meeting of the Association a law was recommended by which the prosecution would be permitted to comment to the jury on the fact that the defendant did not take the stand as a witness. By section 325 of the American Law Institute Code, it is provided that the court may make such comment on the evidence as in its opinion is necessary for the proper determination of the cause.)"

Missouri Supreme Court Decides "Unlawful Suits"

FINDS CERTAIN TRUST COMPANIES ENGAGED IN "LAW BUSINESS" IN VIOLATION OF STATUTE.

IN A DECISION handed down in July in three cases brought by Franklin Miller, Circuit Attorney of St. Louis, against certain trust companies, the Supreme Court of Missouri found that the respondents had engaged in "law business" in violation of statute.

The original proceeding was by information in the nature of *quo warranto*. The information stated that the St. Louis Union Trust Company had "for a long time continuously and wilfully violated the laws of this state, and has unlawfully assumed and usurped franchises and privileges, to wit, to practice law and do law business, not granted to it by the state laws."

In a long opinion the court first sets forth in detail the charges, and the relators' points and authorities, and the statutes involved.

The court said in part:

Attempt to Satisfy Bar Association

"The evidence shows that prior to July 3, 1930, when respondent adopted a resolution setting forth 'rules for the transaction of its business,' which one of respondent's vice-presidents testified was 'an attempt to satisfy the Bar Association and to prevent litigation,' respondent drafted wills and gave advice concerning the same whenever a prospective maker of a will agreed that respondend should be named as executor or fiduciary therein, and it appears that one of respondent's employes continued to follow this practice for a year or so after the resolution was adopted, although after such adoption it was the practice of other employes to refuse to draft wills unless requested to do so or to 'collaborate' therein by the will maker's regular counsel or counsel suggested by respondent and not in its sole employ. However, there was evidence that respondent, since the adoption of its aforesaid resolution, at times drafted and submitted wills though not requested to do so by the will maker's counsel, and that sometimes such counsel's request for and participation in the rendition of such services were obviously perfunctory. According to the proof of respondent's practice, both prior and subsequent to July 3, 1930, its nomination as executor or trustee in a will or trust instrument was accomplished by a simple bilateral contract or agreement between respondent and the maker consisting of an offer or promise by respondent to render such services for such nomination and a return promise by the maker of the nomination for the services, both promises being made simultaneously. 'In bilateral contracts the consideration is a return promise.' (American Law Institute Restatement of Contracts, Vol. I, par. 75, comment a. p. 82.) 'Mutual promises are concurrent considerations, and will support each other if they be made simultaneously, unless one or the other be void.' (Wharton's Law Dictionary, Sec. Am. Ed. p. 170, defining classes of valuable considerations.) It is true that no such contract in writing was offered in evidence, and it may be fairly inferred from all the evidence that these contracts were not reduced to writing and perhaps not even orally expressed in detail as above stated, but the inescapable conclusion from the pleadings and proof before us is that such was the meeting of minds whenever respondent drew or 'collaborated' in drawing such instruments and gave advice in connection therewith.

$250,000 Annually Not "Illusory Promise"

"But, counsel for respondent say, such nomination cannot constitute a valuable consideration because it 'may be revoked at any time without any wrong to respondent.' Conceding that makers of wills and trust agreements can and sometimes do revoke their nominations of executors and trustees, does it follow that a nomination when given is not a valuable consideration for services rendered? Undoubtedly drafting or assisting in drafting wills and trust agreements and giving advice in connection therewith are some trouble and inconvenience to respondent and some benefit to the persons for whom these services are rendered. Also the mere nomination of respondent as executor or trustee is a surrender by the maker to respondent of his right to nominate another unless and until the nomination is revoked, and certainly respondent is in no position to say that these mere nominations do not constitute a valuable consideration when the evidence shows that after years of experience it still maintains an expensive staff to solicit them and to render the 'free' service it deems necessary to obtain them, and that, notwithstanding some revocations by the makers, these mere nominations have resulted in attaching business for the transaction of which respondent's annual compensation exceeded $250,000.00 for each of the years 1926, 1927, 1928, 1929 and 1930. The demonstrated certainty of business benefit flowing to respondent from its mere nomination as executor or trustee in such instruments sets at naught all argument that the nomination is a mere 'motive,' moral obligation, or 'hope' of benefit, as distinguished from a valuable consideration. Hence, the

inapplicability of respondent's cited cases holding that mere motive, hope, or moral obligation is not a valuable consideration. Likewise, respondent's authorities on lack of mutuality and indefinite or illusory promises are without application.

"Collaboration" Not Eleemosynary Service

"Counsel for respondent also say that any compensation received by respondent is for acting as executor or trustee and not for drawing the instrument or giving advice in connection therewith. Surely in this modern day it will not be said that it costs nothing to acquire business. It must be inferred from the evidence before us that no inconsiderable part of the cost of obtaining these nominations is chargeable to the staff maintained to draw or 'collaborate' in drawing these instruments and give advice in connection therewith. Naturally this part of the overhead expended in obtaining the business must be paid out of the compensation received for transacting the business so obtained. Hence, we do not see how it can be truthfully said that each and every nomination procured by this thinly disguised method of getting business is not a valuable consideration to respondent.

* * * * * * * *

Usurpation of Rights and Power

"Upon the pleadings and evidence we are constrained to hold that respondent has usurped rights and privileges not conferred upon it or warranted by law, in that it has engaged in 'law business' in violation of the statutes of this state as charged in the information. In view of this conclusion we reserve ruling upon the question of respondent's amenability to law independent of the statutes.

"It appears from the whole record that this proceeding was ably, fairly, vigorously and in good faith conducted on both sides for the purpose of determining what respondent could lawfully do and what it could not lawfully do in the premises pleaded. The prayer of relator's information asks neither ouster nor fine herein. The character of judgment in a quo warranto case is largely within the discretion of the court. (State ex rel. Barrett v. First National Bank, 297 Mo. 397, 416, 249 S. W. 619; State ex inf. Hadley v. Delmar Jocket Club, 200 Mo. 34, 66, 69, 98 S. W. 539.) We think that the evident purpose of this proceeding will be best served by imposing a nominal fine and costs upon respondent and in other respects following the prayer of the information. Therefore, it is ordered and adjudged that respondent pay a fine of one dollar ($1.00) and the costs herein, and that respondent henceforth cease and desist from the aforesaid illegal practices and conduct its business according to law on penalty of the forfeiture of its corporate charter and franchise."

The "Why" of Public Utility Rates

By Jack Hardy, of the Los Angeles Bar

IT IS fundamental under the American form and system of government that so long as one does not injure the rights of others, he may use his property as he chooses—free from regulation or control by the state. There is, however, an exception to this general principle. *When private property is dedicated to a public use or service,* and its operation involves the public welfare, the property is said to be "affected with a public interest," and is thereafter subject to regulation by the state.

This principle was recognized over 200 years ago by Lord Chief Justice Hale when he declared that when private property is "affected with a public interest it ceases to be *juris* private only."

This doctrine has been accepted and applied by the courts and legislatures of this country. An early and leading American case applying it was *Munn v. Illinois* (94 U. S. 113, 24 Law Ed. 77), wherein the Supreme Court of the United States held that a *public grain elevator* was "so affected with the public interest" that it was a proper subject for public regulation and control. The court declared that the right to regulate included the right to prescribe and fix the rates and charges to be collected from the public for the use of grain storage facilities.

This right of public regulation of private property rests upon the fundamental and inherent right of a sovereign state to restrict personal liberty and the use of private property, when that becomes necessary in the best interests of the public welfare. The police power must, however, be exercised reasonably, and in conformity with the legitimate considerations of the public health, safety and welfare.

Public Regulation

In this connection it is interesting to note some rather recent language of the United States Supreme Court. In discussing the reasonableness of certain telephone rates, that court said:

> "It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the *owner of the property* of public utility companies, and is not clothed with the general power of management incident to ownership."

As social and economic concepts have expanded, an increasing number of industries and callings have been declared by the legislatures and courts to be "affected with public interest," and therefore subject to public regulation. At present, the list includes, among many other commodities and public services, gas, electricity, water, transportation, the telephone and telegraph, cotton gins, warehouses, wharves, canals and pipe lines.

In order to carry this public regulation into effect, most states have established public service commissions, and clothed them with certain legislative and judicial powers, enabling and directing them to determine and establish reasonable rates for the commodity or service rendered; to prevent discrimination against the users of public utility service; to make rules and orders governing their conduct, to the end that they may render the most efficient service at the lowest cost to the public.

In California, these powers have been delegated to the Railroad Commission. The California Constitution and Public Utilities Act give the Railroad Commission power and jurisdiction to supervise and regulate every public utility in the state, and *to do all things necessary and convenient to the exercise of that power.* (California Constitution, Art. XII, Secs. 22, 23, 23a, Stats. 1915, Ch. 91, p. 115, as amended.)

It may be said generally that utilities are

operated on the theory of a regulated monopoly. This is permitted and encouraged to avoid the economic waste and extravagance necessarily attendant upon a duplication of equipment and facilities, and the destructive effect of competitive price cutting. In return for this protection, utilities are required to render to the public a high standard of service at reasonable rates and charges.

Regulatory Powers

The regulatory power includes, among other things, the power to fix utility rates and charges. It does not however, permit the fixing of rates which do not allow a public utility to earn *a reasonable return on the fair value of the property devoted to the public use.* Such rates have been repeatedly declared to be a "taking" of private property without "due process of law," in violation of the express prohibition of the 14th Amendment to the Federal Constitution.

The courts have declared that rates which permit a return varying from six to eight per cent on the fair value of the utility property are reasonable, depending upon the nature and character of the commodity sold or the service rendered.

It is to be remembered, however, that while a Commission or other regulatory body has power to fix maximum rates which a utility may charge in order to earn a "reasonable return on the fair value of its property," the commission does *not guarantee* that the rate so fixed *will* result in a "reasonable return." Not infrequently utilities find themselves saddled with a rate structure which results in revenues far below the estimates made by the commission in its computations.

The real difficulty, however, lies in the accurate determination of what is the "fair value" of utility property for rate fixing purposes. Some idea of the complexity of the problem may be gathered from the fact that for many years courts and the utility commissions have experimented with at least five theories, in an effort to establish a just and equitable means of determining the elusive factor we term "fair value." Some declare that the sound test is the "original cost"; others state, with equal conviction, that the best criterion is the "present cost of reproduction"; while still others rely upon the theory of a "prudent investment."

An early, but leading American case wherein the United States Supreme Court discussed the elements to be considered in determining the "fair value" of utility property, is *Smyth v. Ames,* (169 U. S. 466, 42 L. Ed. 879) (1897).

Therein Mr. Justice Harlan said:

> "We hold that the basis of all calculations as to the reasonableness of rates to be charged by a corporation * * * must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and must be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

It is apparent that no one element or simple combination of factors may be accepted as a "rule of thumb" test of "fair value."

Economic Trends

Current economic and political trends frequently influence the adoption of a particular theory for determining "fair value." Thus, in various periods of our economic and social progress, the same regulatory bodies have swung from the "present cost of reproduction" theory to the "original

cost" theory, and to a valuation based upon "historical cost less depreciation." The history of public utilities, however, indicates that the ever-broadening scope of regulation is the result of the pressure of social and economic forces, rather than from a change in political or legal theory.

Utility services directly effect so many people that it is inevitable that the public is chiefly and almost solely interested in a reduction of the charges they are called upon to pay, rather than the refinements of legal theory which determine those charges. It *is* difficult to maintain a disinterested and impartial attitude when the pocketbook is affected.

Recently the Los Angeles Gas & Electric Company claimed that gas rates fixed by the California Railroad Commission were unreasonable and confiscatory. The case (*Los Angeles Gas & Elect. Corp. v. Railroad Com. of Cal.*) was ultimately appealed to the Supreme Court of the United States, (289 U. S. 287, 77 L. Ed. 1180), (1933). The court, in its determination of the "fair value" of the Company's property for rate-making purposes, took judicial notice of current economic conditions, but declared *that general economic trends,* rather than periodic price fluctuations, were to be considered in determining the question of the "fair value" of utility property.

In holding that a return of seven per cent (7%) on the "fair value" of the property devoted to the public use, was not unreasonable or confiscatory, it was said:

> "The court has refused to be bound by any *artificial* rule or formula which changed conditions might upset. We have said that the judicial ascertainment of value for the purpose of deciding whether rates are confiscatory, is not a matter of formulas, but *there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."*

Still more recently, in the case of *Lindheimer v. Ill. Bell Telephone Co.* (78 L. Ed. 845, 1934), the same court was called upon to pass on the reasonableness of telephone rates fixed by the Illinois Utility Commission. The court, speaking through Mr. Justice Hughes, declared that though depreciation was a fact, and existed in all utility property, and that deductions for that item were proper, yet theory should not prevail over facts, where actual experience, after the rate order was made, showed that the utility was *in fact* earning a reasonable return on the "fair value" of its property devoted to the public use.

Thus, in the final analysis, rates paid for the service or commodity sold by a public utility are to be determined in the light of all available facts and experience. Being once determined, they should not be altered except where further experience demonstrates that the rate is either too low and therefore confiscatory, or too high, and therefore unreasonable.

Bitter Controversy

Utility rates have been a subject of long litigation and bitter controversy. Today there is loud clamor for their indiscriminate reduction. Politicians, well understanding the "appeal of the pocket book," eagerly seize upon "rate-reduction" platforms, while enjoying abysmal ignorance of the facts and complexity of the problems presented.

When private capital is invested in a business enterprise, other than a public utility, the proprietor may, and generally does, charge all that the traffic will bear for the particular commodity or service sold. Profits ranging from 100 to 300 per cent on an investment are not uncommon. Rises in utility rates were, however, checked during the years of prosperity, on the theory that such industries were not entitled to speculative profits in view of their stable character.

Generally speaking, rates remained stationary, when distress selling and absence of demand led to a sharp decline in price of other commodities—often to a point below production cost. The ratio of income required to pay utility bills mounted, as the prices of other commodities declined. A loud and insistent demand for rate reductions has swept the country. However, most public utility commissions have protected utility investments and resisted unreasonable demands for arbitrary reductions, recognizing a duty, under the circumstances, to permit utilities to fare better than other industries in depression times, since they had been deprived of rich profits during boom years.

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